80-663

No. 80-

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

KELSEY-HAYES, INC.,

Petitioner,

v.

ROY HOPKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the New Jersey tolling statute which denies the statute of limitations defense to all corporations which do not have a registered agent in the state, even though such corporations are subject to long-arm jurisdiction, lacks a rational basis and thus violates established principles of equal protection and due process of the Constitution of the United States as set forth in decisions of this Court?

2. Whether the resultant pressure upon corporations throughout this country engaged solely in interstate commerce to register to do business in New Jersey to avoid the penalty of defending stale claims, constitutes an impermissible infringement upon interstate commerce in violation of the commerce clause of the Constitution of the United States?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The matter of *Roy Hopkins v. Kelsey Hayes, Inc.* was consolidated with the case of *Cohn v. G. D. Searle & Co.* by the United States Court of Appeals for the Third Circuit for purposes of oral argument and disposition. Counsel for Petitioner, Kelsey-Hayes, Inc. is advised that G. D. Searle & Co. is also filing a Petition for Writ of Certiorari.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit from which review is sought is not officially reported, but is set forth in Appendix "A" (App. 1a). The opinion of the District Court is reported at 463 F. Supp. 539 (D. N. J. 1978) and is set forth in Appendix "B" (App. 25a).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1) to review a judgment of the United States Court of Appeals for the Third Circuit dated and entered on July 23, 1980.

STATUTES AND RULE INVOLVED

The New Jersey Tolling Provision, N. J. S. A. § 2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so rep-

resented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

The New Jersey Long-arm Rule 4:4-4(c)(1) provides:

> If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing [methods for service within the state] and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

The New Jersey Statute of Limitations, N. J. S. A. § 2A:14-2 provides:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

STATEMENT OF THE CASE

This is a matter in which the constitutional validity of the New Jersey tolling statute has been attacked by the Petitioner, Kelsey-Hayes, Inc., a corporation engaged solely in interstate commerce, which is not registered to do business in New Jersey on the grounds that the operation of the statute denies Kelsey-Hayes due process and equal protection and also because it infringes upon the right of Kelsey-Hayes to engage in interstate commerce without infringement or penalty.[1]

These constitutional questions arise from a suit for personal injuries allegedly sustained by the plaintiff, Roy Hopkins, on May 18, 1975, when a truck tire and rim that he had mounted "exploded" while being inflated, striking him in the head and causing injury. Plaintiff filed a timely suit against the tire manufacturer, as well as several other defendants which is presently pending in the Superior Court of New Jersey. Plaintiff, after the statute of limitations had already expired, filed suit against Kelsey-Hayes, Inc. on April 27, 1978, also in the Superior Court of New Jersey. Service was effected by mailing a copy of the Summons and Complaint to Kelsey-Hayes' registered office in Delaware. Kelsey-Hayes, Inc. then removed this matter to the U. S. District Court for the District of New Jersey. Jurisdiction of the Federal Court was based upon diversity of citizenship and amount in controversy.

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1. Notice of this appeal has been given to the New Jersey State Attorney General because 28 U. S. C. § 2403(b) may be applicable. The Court of Appeals and the District Court below did not certify to the State Attorney General the fact that the constitutionality of N. J. S. A. 2:14-22 was drawn into question. However, the State Attorney General was given notice of a similar challenge in *Velmohos v. Maren Engineering Corp.*, 83 N. J. 282, 416 A. 2d 372 (1980) as related in the decision of the Appellate Division below; 168 N. J. Super. 520 n. 1 (App. Div. 1979) and did not appear.

Thereafter, Kelsey-Hayes filed a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure on the ground that plaintiff's action was barred by the applicable New Jersey statute of limitations. Plaintiff responded that the defendant, as a foreign corporation not registered to do business within the State of New Jersey, should not have the benefit of the statute of limitations because of the New Jersey tolling statute, N. J. S. A. 2A:14-22 even though Kelsey-Hayes did business and was subject to long-arm jurisdiction since the date of injury. Plaintiff further responded that even if the statute of limitations applied he should have the benefit of the "discovery" exception to the statute of limitations since he allegedly was not even aware that he had a potential cause of action against Kelsey-Hayes until after the statute of limitations had already expired.

On December 18, 1978, the District Court issued an Opinion and Order holding that the running of the statute of limitations was tolled by the New Jersey tolling statute and concluding that the statute did not offend either due process or equal protection. *Hopkins v. Kelsey-Hayes, Inc.*, 463 F .Supp. 539 (D. N. J. 1978) (Appendix "B"). The District Court expressly declined to decide the "discovery" exception issue, on the grounds that such was not necessary in view of its decision that Kelsey-Hayes did not have the benefit of the statute of limitations in the first instance.[2] In its decision, the District Court did note that another District Court judge had shortly before reached an opposite conclusion, holding that the tolling provision was unconstitutional, as had been urged by

2. The history of this case as recited by the Court of Appeals is essentially accurate, except for the court's statement that Kelsey-Hayes did not respond to plaintiff's "discovery" argument at the pre-trial stage. Indeed, the parties specifically requested that the District Court decide the "discovery" issue.

Kelsey-Hayes herein. *Cohn v. G. D. Searle & Co.*, 447 F. Supp. 903 (D. N. J. 1978).

In view of this split of authority in the district court on these important issues, Kelsey-Hayes requested and was granted certification to appeal pursuant to 28 U. S. C. § 1292(b). The Court of Appeals then consolidated *Hopkins* with *Cohn* for purposes of oral argument and disposition. The extreme importance and timeliness of the issues presented to the Court of Appeals was then further evidenced by the fact that the same issues were then pending before the New Jersey Supreme Court in the case of *Velmohos v. Maren Engineering Corp.*, 83 N. J. 282, 416 A. 2d 372 (1980). The Court of Appeals accordingly held its decision in these cases pending the decision of the State Supreme Court in *Velmohos*. On June 18, 1980, the New Jersey Court rendered its decision which, in essence, upheld the constitutionality of the tolling provision. The Court of Appeals in its opinion in this case dated July 23, 1980 followed the New Jersey decision. (Appendix "A").

Counsel for Kelsey-Hayes has been advised that a Notice of Appeal and Statement of Jurisdiction has recently been filed in this Court by defense counsel in *Velmohos* and also that defense counsel in *Cohn* is also filing a Petition for Writ of Certiorari requesting that this Court review the decision of the Court of Appeals on these issues.

REASONS WHY THIS PETITION SHOULD BE GRANTED

I. The Decision of the New Jersey Supreme Court in *Velmohos* as Followed by the Court of Appeals Herein, Clearly Violates Established Principals of Due Process and Equal Protection as Set Forth in Decisions of This Court on an Important Issue Which Has Never Before Been Addressed by This Court.

The decision of the New Jersey Supreme Court in *Velmohos*, as followed by the Court of Appeals means, in essence, that an out-of-state corporation which is not registered to do business in the state of New Jersey does not have the benefit of any New Jersey statute of limitations. In short, a New Jersey plaintiff can wait a decade or more and then decide to institute suit at his own pleasure without fear of having his claim time-barred. In contrast, if the corporate defendant were a New Jersey corporation or a foreign corporation having sufficient contacts in New Jersey so as to be required to register to do business therein, the statute of limitations would apply. It is submitted that the total denial of any statute of limitations defense to foreign unregistered corporations such as Kelsey-Hayes is blatantly unfair and a denial of equal protection and due process in conflict with decisions of this Court. e.g. *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 172 (1972).

It is submitted further that such discrimination was never consciously intended by the New Jersey legislature. *Lemke v. Bailey*, 41 N. J. 295, 305, 196 A. 2d 523 (1963) (Dissenting Opinion). Rather, this unfortunate situation arose because of an "aged" New Jersey tolling statute originally enacted in 1820. At that time, as this Court is well aware, there was no extra territorial jurisdiction and consequently, a tolling statute was necessary to preserve a plaintiff's cause of action against a foreign defendant who

entered the state, committed a tort and departed. The New Jersey tolling provision N. J. S. A. 2A:14-22, at issue herein, was last amended in 1949 when it was amended to include its present provisions regarding corporations.

In 1945 this Court decided *International Shoe Co. v. State of Washington*, 326 U. S. 310 (1945) which first permitted State Courts to exercise *in personam* jurisdiction over out-of-state defendants, as pointed out by the Court of Appeals in its opinion in *Hopkins* at Footnote 4. However, in concluding that long-arm jurisdiction was thus available to New Jersey plaintiffs prior to the last amendment of the tolling statute in 1949, the Court of Appeals overlooked the fact that long-arm jurisdiction over corporations only actually became available to New Jersey plaintiffs in 1958 when the New Jersey Supreme Court adopted such a procedure. R. R. 4:4-4(d) (effective Sept. 3, 1958) R. 4:4-4(c)(1) effective Sept. 8, 1969 (current version). See generally, *Cohn v. Searle & Co.*, 447 F. Supp. 903, 910 (D. N. J. 1978). Hence, in view of actual New Jersey practice, the tolling provision was necessary and reasonable at the time of its adoption and last amendment. Further, since the Supreme Court of New Jersey has exclusive rule making power over practice and procedure under the New Jersey Constitution, the legislature never could or did adopt a long-arm statute and hence did not have to review the inherent conflict with their tolling provision raised by the advent of long-arm jurisdiction.

In the instant case, since the alleged tort occurred in 1975, the plaintiff could have obtained long-arm jurisdiction over Kelsey-Hayes at any time, until he finally did so in April of 1978. Hence, the tolling provision was totally unnecessary to preserve the plaintiff's cause of action against Kelsey-Hayes since Kelsey-Hayes was always subject to the jurisdiction of the New Jersey courts as it would have been if it were a domestic or registered corporation.

The Court of Appeals in *Hopkins* blindly followed the discussion of the Supreme Court of New Jersey in *Velmohos* which attempted to find some rational or legitimate state purpose in the tolling provision on the stated grounds that it *may be* more difficult to locate or serve a foreign corporation under the long-arm rule than a registered corporation thus presumably causing the plaintiff to fail to commence the action within the statutory period. It is readily apparent that such an attempted rationalization has absolutely no relationship to the facts of this case (or apparently to the facts in *Cohn* or *Velmohos* for that matter) since the plaintiff has admitted that he did not even attempt to sue Kelsey-Hayes until after the statute of limitations had already expired! Indeed, because the plaintiff alleges that he did not discover his cause of action until after the statute had expired, he argued below that he was entitled to a separate "discovery" exception to the statute of limitations. Hence, the protection afforded by the tolling provision is clearly overly broad as applied herein, unnecessary, and hence unconstitutional. *Reed v. Reed*, 404 U. S. 71 (1971); *Royster Guano Co. v. Virginia*, 253 U. S. 412 (1920).

Further, under New Jersey practice, it is not necessary to actually serve a corporate defendant in order to *preserve* a plaintiff's cause of action which is the "obvious purpose of the tolling statute". *Lemke v. Bailey*, 41 N. J. at 303 (dissenting opinion). *See also, Cohn v. Searle & Co.*, 447 F. Supp. at 912; *Ferraro v. Ferro Trucking Company*, 72 N. J. Super. 519, 179 A. 2d 74 (Law Div. 1962). Rather, under the New Jersey practice, a plaintiff need only name a defendant or file a "John Doe" Complaint and use reasonable effort to locate and serve the defendant thereafter. When balancing the interests between a plaintiff's right to sue and a defendant's right to repose and the

ability to defend itself when evidence is available and memories are fresh, it should not be too much burden to require that a plaintiff at least use some effort and diligence to locate and serve the defendant after the two year statute of limitations has already expired! Further, as stated most recently by the New Jersey Supreme Court, "The purpose of statute of limitations is to 'stimulate to activity and punish negligence' and 'promote repose by giving security and stability to human affairs' ". *O'Keeffe v. Snyder,* 83 N. J. 478, 416 A. 2d 862 (1980) citing *Weed v. Carpenter,* 101 U. S. 135, 139 (1979); *Tevis v. Tevis,* 79 N. J. 422, 430-431 (1979); *Fernandi v. Strully,* 35 N. J. 434, 438 (1961). It is thus clear that the *purpose* of the New Jersey statute of limitations, N. J. S. A. 2A:14-2 is thwarted by the decision of the Court of Appeals.[3] Moreover, the Court of Appeals in its opinion, overlooks the fact that if a plaintiff cannot obtain long-arm jurisdiction, or if the defendant successfully contests same, the tolling provision would apply and the plaintiff's cause of action would be preserved.

For all of these reasons, it is apparent that the distinction drawn between foreign non-registered corporations and domestic or corporations registered to do business in New Jersey, in reality lacks any rational basis since *all* are subject to the jurisdiction of the New Jersey courts. Thus, the distinction drawn bears no "fair and substantial relation to the object of the legislation" and thus is in clear violation of the Due Process and Equal Protection clauses of the United States Constitution and decisions of this Court. *Royster Guano Co. v. Virginia,* 253 U. S. 412 (1920). The fact that this Court is now presented with

3. For a critical analysis of the decision of the Appellate Division in *Velmohos* on this ground and others see a recent comment in 10 *Seton Hall L. Rev.* (1980) entitled "The Tolling Provision of the Statute of Limitations—a Haven for the Dilatory Plaintiff."

three Petitions by separate defendants all requesting that this Court hear this issue, demonstrates that this is not an isolated problem, but rather an injustice which will continue, unless this Court considers this issue for the first time and speaks to the contrary.

II. The Decision of the Court of Appeals Fails to Address the Important Federal Question Raised by the Coercion Upon Foreign Corporations to Register in New Jersey in Clear Violation of the Commerce Clause, Which Issue Has Not Been Previously Addressed or Resolved by This Court.

That the effect of the tolling provision upon unregistered foreign corporations is to act as a penalty for not registering in New Jersey in clear violation of the commerce clause, was first recognized by District Judge Meanor in his opinion in *Cohn v. Searle & Co.* In his opinion, Judge Meanor invalidated the tolling provision on equal protection grounds, but also noted that the statute runs afoul of the commerce clause as well. *Cohn v. G. D. Searle & Co.*, 447 F. Supp. 903 n. 17 (D. N. J. 1978). It is important to point out that even though this important federal question was raised by both Kelsey-Hayes and Searle before the Court of Appeals, that Court totally failed to address this issue.

The adverse effect upon interstate commerce caused by the tolling statute is obvious. If the decision of the Court of Appeals is not reviewed by this Court, Kelsey-Hayes, along with other non-registered corporations throughout this country, will be forced to register to do business in New Jersey or suffer the very real possibility of being subjected to suit decades after the alleged date of occurrence with the resultant inability to defend adequately. The impact of the decision below thus extends far beyond the boundaries of New Jersey, simply because

New Jersey has adopted long-arm jurisdiction to the full extent of the law. *Avdel Corp. v. Mercure,* 58 N. J. 264, 277 A.2d 207 (1971). Consequently, virtually every manufacturer of goods throughout the country, if they are prudent, will take steps to register in New Jersey since there would always be the possibility that one of their products might find its way into the state and result in a claim for personal injury.

At the same time as corporations who take heed of the decision of the Court of Appeals are facing coercion to register or face the consequences, the decisions of this Court are clear that a state may not constitutionally require a corporation, such as Kelsey-Hayes, which is engaged *solely* in interstate commerce to register in that state. *Eli Lilly & Co. v. Sav-On Drugs, Inc.,* 366 U. S. 276, 278 & n.7 (1961); *Sioux Remedy Co. v. Cope,* 235 U. S. 197 (1914). As this Court is well aware, the standard of state contacts sufficient for long-arm jurisdiction is substantially lower than that for "transacting business" with its resultant obligation to register in a state. *Materials Research Corp. v. Metron,* 64 N. J. 74, 312 A. 2d 147 (1973); *United States Time Corp. v. Grand Union Co.,* 64 N. J. Super. 39, 165 A. 2d 310 (Ch. Div. 1960). The decision of the Court of Appeals virtually obliterates this distinction. Thus while New Jersey law provides that registration is not required where corporate activities do not meet the standard of "transacting business,,' corporations such as Kelsey-Hayes, engaged solely in interstate commerce are being penalized for not doing so. See N. J. S. A. 14A:13-3(2); N. J. S. A. 14A:13-11 (1969).

Consequently, there can be no question but that the tolling provision places an undue and unconstitutional burden upon interstate commerce and raises a serious federal question not addressed by the Court of Appeals and not previously addressed by this Court.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Third Circuit Court of Appeals in order to review the judgment of that Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1881

ROY HOPKINS, *Appellee*

v.

KELSEY-HAYES, INC., *Appellant*

Nos. 79-2406 and 79-2605

SUSAN COHN and WALTER COHN, her husband,
Appellants in No. 79-2406
Cross-Appellee in No. 79-2605

v.

G. D. SEARLE & COMPANY,
Appellee in No. 79-2406
Cross-Appellant in No. 79-2605

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Nos. 78-1646 and 74-0450)

Argued: February 11, 1980

Before: ADAMS, GARTH, and VAN DUSEN
Circuit Judges

(Filed July 23, 1980)

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OPINION OF THE COURT

GARTH, *Circuit Judge.*

These appeals[1] present us with constitutional challenges to a New Jersey statute, N.J.S.A. §2A:14-22, which tolls the statute of limitations in actions against foreign corporations which are not represented in New Jersey, but which may nonetheless be amenable to New Jersey's long-arm jurisdiction. By contrast, foreign corporations which are represented in New Jersey receive the full benefit of all limitations statutes. Thus, the de-

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1. Although these cases were tried separately before two different district court judges, because they involve identical challenges to the constitutionality of a New Jersey statute, N.J.S.A. §2A:14-22, we consolidated them for the purposes of oral argument and disposition.

fendants here, both non-represented foreign corporations, claim that N.J.S.A. §2A:14-22, by refusing them the protection of the limitation statute, has denied them due process and equal protection of the laws under the United States constitution.

We do not agree, as we conclude that the New Jeresy statute is not irrational. Thus, we will not disturb New Jersey's legislative enactment, which we hold satisfies constitutional standards.

I.

A.

In the first of these appeals, *Cohn v. G.D. Searle & Co.*, the plaintiffs, who are husband and wife, sued G.D. Searle & Co. (hereinafter "Searle") in tort for damages caused by a birth control pill, Enovid, which had been manufactured by Searle and which allegedly contributed to a stroke suffered by Mrs. Cohn. Searle is a Delaware corporation with its principal place of business in Illinois. Although it was at all times subject to New Jersey's long-arm jurisdiction, *see* N.J. Ct. R. 4:4-4(c)(1),[2] Searle was not registered to do business in New Jersey, and it maintained no agent for service of process in New Jersey. In fact, the only personnel affiliated with Searle

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2. Rule 4:4-4(c)(1) permits long-arm service upon out-of-state corporations in the following circumstance:

> If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing [methods for service within the state] and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

who were located in New Jersey, during the time period relevant to this litigation, were 40 so-called "detail-persons" who worked out of their own homes and whose sole function was to generate good-will for Searle among New Jersey doctors.

Before trial, Searle claimed the benefit of New Jersey's two year statute of limitations as a defense. N.J.S.A. §2A:14-2.[3] In response, the plaintiffs claimed that the statute of limitations was no bar to their complaint because N.J.S.A. §2A:14-22 (hereinafter the "tolling provision") tolls the limitations statute in any action against a foreign corporation which "is not represented in this state by any person or officer upon whom summons or other original process may be served. . . ."[4]

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3. N.J.S.A. §2A:14-2 provides:

Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

4. N.J.S.A. §2A:14-22 provides in relevant part:

If any person against whom there is any of the causes of action specified . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, *or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served,* when such cause of action accrues or at any time before the expiration of the times so limited, *the time or times during which* such person or surety is not residing within this state or *such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

With the issue thus framed, and conceding that no facts were in dispute, Searle then moved for summary judgment, asserting that the Cohns' claim was barred by the statute of limitations. Searle argued that the tolling provision was not applicable in this case because Searle was "represented" in New Jersey by its detail-persons. Alternatively, Searle contended that the tolling provision, if applicable to it, could not pass muster under the equal protection clause of the United States constitution in that it drew an arbitrary and irrational distinction between foreign corporations represented in New Jersey and foreign corporations not so represented, but which were nevertheless subject to New Jersey's long-arm jurisdiction.

The district court rejected Searle's argument that the presence of detail-persons in New Jersey afforded Searle the benefit of the statute of limitations. On the other hand, the district court accepted Searle's contention that the tolling provision was unconstitutional. 447 F. Supp. 903 (D.N.J. 1978). Reasoning that the tolling provision must be interpreted in light of the legislative intent at the *time of its enactment*, the court held that Searle's detail-persons were not adequate corporate "representatives" within the meaning of the tolling provision inasmuch as, at the time that provision was most recently amended, in 1949,[5] jurisdiction could be ob-

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(emphasis added).

Plaintiffs claimed, alternatively, that the statute of limitations was tolled by N.J.S.A. §2A:14-21 which stops the running of the limitations period against persons who are "insane" when their causes of action accrue. In an unpublished opinion, the district court found that on this record, plaintiff's condition did not constitute insanity within the meaning of N.J.S.A. §2A:14-21. Consequently, the district court rejected this alternative argument. In light of our conclusion, *see infra*, that N.J.S.A. §2A:14-22 tolled the running of the limitations statute in this case, we need not, and do not, reach the merits of this contention.

5. As the New Jersey Supreme Court has noted, the roots of the tolling provision are traceable as far back as 1820. *See* Lempke

tained over a foreign corporation only by serving, within New Jersey, an "officer, director, trustee or a managing

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NOTE 5 — *(Continued)*

v. Bailey, 41 N.J. 295, 196 A.2d 523 (1963). In its original form, and up until 1949, however, the tolling provision made no specific reference to corporations. *Id.* (citing Pennington, *Laws of New Jersey, 1703-1820* at 670 (1821). As of 1949, the tolling provision, which thus denied both represented and non-represented foreign corporations the benefits of New Jersey's statutes of limitations, read as follows:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6; 2:24-16 or 2:24-17 of this title is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, the time or times during which such person is not residing within this state shall not be computed as a part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause therefor, within the periods of time limited therefor by said sections, exclusive of such time or times of non-residence.

N.J.R.S. §2:24-7.

In 1949, the tolling provision was amended to its present form, referring, for the first time, to corporations "*represented in this state* by any person or officer upon whom summons or other original process may be served." Act of May 18, 1949, 1949 N.J. Laws, ch. 125 (amending N.J.R.S. §2:24-7) (1937)) (currently codified at N.J.S.A. §2A:14-22) (emphasis added). The legislative statement accompanying the 1949 amendments to the tolling provision explained this provision as follows:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its law in view of recent court decisions.
>
> The New York tolling law which is referred to in the legislative statement was N.Y.C.P.A. §19, which had been amended in 1943 so as to include as beneficiaries of the New York statutes of limitations, foreign corporations with "one or more officers or other persons in the state on whom a summons for such corporation may be served." Act of April 3, 1943, 1943 N.Y. Laws, ch. 263.

or general agent of the corporation."[6] *In personam* jurisdiction over Searle, therefore, could not have been obtained by service on mere detail-persons. 447 F. Supp. at 909-10.

Having disposed of this statutory issue, the district court then turned to Searle's constitutional claims. The court observed that the purpose of the tolling provision, when it was originally enacted and as it was subsequently amended, *see* note 5 *supra*, was to protect New Jersey plaintiffs asserting causes of action against corporate defendants which were not subject to *in personam* jurisdiction in the New Jersey courts. In light of this purpose, the court concluded that the tolling provision was no

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6. In 1949, the New Jersey rules governing service of process on corporations were as follows:

N.J.R.S. §2:26-43. *Domestic corporations in personal actions; personal or substituted service summons.*

Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy hereof to an officer, director, trustee or a managing or general agent of the corporation personally, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, or by delivering a copy thereof to any person authorized by appointment or by law to receive service of process on behalf of the corporation, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.

N.J.R.S. §2:26-44. *Foreign corporations.*

Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised Statutes for service of summons upon a domestic corporation.

New Jersey's rule for long arm service was not promulgated until 1958, N.J. Ct. R.R. 4:4-4(d) (effective September 3, 1958) (presently N.J. Ct. R. 4:4-4(c)). *See* note 2 *supra*. It was not until 1971, however, that the New Jersey Supreme Court construed the long-arm rule to permit out-of-state service "to the uttermost limits permitted by the United States Constitution." Avdel Corp. v. Mecure, 58 N.J. 264, 277 A.2d 207 (1971).

longer relevant in cases where the out-of-state defendant was now subject to the long-arm jurisdiction of the New Jersey courts — a jurisdictional expansion which, in New Jersey,[7] post-dated the 1949 amendment to the tolling provision. Therefore, the district court held that the continued application of the tolling provision in cases such as this one served no rational purpose and consequently violated the United States constitution. *See* 447 F. Supp. at 910-12.

Both parties appealed from the judgment of the district court. In No. 79-2605, Searle contends that the district court erred by concluding that the presence of its detail-persons in New Jersey did not entitle it to the benefit of the statute of limitations. In No. 79-2406, the Cohns argue, contrary to the district court's holding, that the tolling provision is a rational exercise of the legislature's prerogative and is thus constitutional.

B.

In the second appeal before us, *Hopkins v. Kelsey-Hayes, Inc.*, the plaintiff, Hopkins, was injured on May 18, 1975 when a tire mounted on a rim which had been manufactured by Kelsey-Hayes exploded. This lawsuit was filed on April 27, 1978, nearly three years after plaintiff's cause of action had accrued. Kelsey-Hayes is a Delaware corporation, which has never been represented in New Jersey. However, at all times it has been subject to New Jersey's long-arm jurisdiction.

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7. The United States Supreme Court sanctioned broad long-arm rules in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), when it held that states could exercise *in personam* jurisdiction over out-of-state defendants with only "certain minimum contacts" with the forum state. Expansive long-arm jurisdiction in New Jersey was not recognized until much later, however. *See* note 6 *supra*.

Before a different district court judge than the judge who presided in *Cohn v. G.D. Searle, Inc.*, Kelsey-Hayes claimed the benefit of New Jersey's two year statute of limitations and moved for summary judgment. Plaintiff responded that the running of the limitations statute was tolled by N.J.S.A. §2A:14-22, *see* note 4 *supra*, and that therefore its complaint was not barred. Alternatively, the plaintiff argued that the statute was tolled under New Jersey's "discovery rule," *see Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 563 (1973), *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961), under which the statute does not begin to run until the plaintiff has had a reasonable opportunity to "discover" the identity of the person who caused his injury. At the pre-trial stage, Kelsey-Hayes responded only to the plaintiff's first argument. It claimed that the tolling provision, when applied to defendants subject to New Jersey's long-arm jurisdiction, violated the due process and equal protection clauses of the United States constitution.

In ruling on Kelsey-Hayes' summary judgment motion, the district court similarly confined its analysis to the constitutionality of the tolling provision. The district court judge in *Hopkins* expressly disagreed with the constitutional holding reached by the district court judge in *Cohn v. G. D. Searle, Inc., supra*. The *Hopkins* court concluded that since under New Jersey law, obtaining jurisdiction over non-represented foreign corporations process under the long-arm rule was more difficult than obtaining jurisdiction over foreign corporations which were represented in New Jersey, a rational basis existed for distinguishing between these two categories of defendants. Having found that this "rational basis" supported the tolling provision, the district court rejected both defendant's due process and equal protection arguments. *Hopkins v. Kelsey-Hayes, Inc.*, 463 F. Supp. 539, 542 (D.N.J. 1978).

Pursuant to 28 U.S.C. §1292(b), the district court and this court certified Kelsey-Hayes' interlocutory appeal from the order denying summary judgment.

C.

Shortly before we heard argument in these cases, counsel called our attention to *Velmohos v. Maren Engineering Corp.*, No. A-72/143 (N.J. Sup. Ct. June 18, 1980), a case which was at that time pending before the New Jersey Supreme Court. *Velmohos* involves the identical issues raised in these appeals.

In *Velmohos*, as in these cases, New Jersey plaintiffs had sued non-represented foreign corporations in tort, and had relied upon the tolling provision in response to a statute of limitations defense. The state defendants in *Velmohos* raised two arguments against application of the tolling provision. First, they claimed that their amenability to New Jersey's long-arm jurisdiction constituted sufficient "representation" within the state to entitle them to a limitations defense — in that case, two years. Secondly, they argued that, as applied to them, the tolling provision violated the federal constitution. In an unreported opinion, the state trial court in *Velmohos* struck down the tolling provision on federal constitutional grounds, adopting the reasoning of the district court in *Cohn v. G. D. Searle & Co., supra*. This decision was reversed by the Appellate Division of the Superior Court, which held that the tolling provision was rational and was thus constitutional. 168 N.J. Super. 520 (App. Div. 1979).

Notwithstanding the pendency of the *Velmohos* appeal before the New Jersey Supreme Court, we heard arguments on the merits in the appeals before us. Nevertheless, recognizing that certain holdings of the New Jersey Supreme Court would have binding effect upon

us,[8] and at the suggestion of all the parties, we agreed to withhold decision in these cases pending the decision in *Velmohos*.

On June 18, 1980 the New Jersey Supreme Court filed its opinion in *Velmohos*, affirming the Appellate Division. *Velmohos v. Maren Engineering Corp.*, No. A-72/143 (N.J. Sup. Ct. June 18, 1980). The court, in construing the New Jersey statute which provides for tolling, held that a foreign corporation's mere amenability to New Jersey's long-arm jurisdiction did not constitute sufficient "representation" of that corporation in New Jersey to prevent the tolling of the statute of limitations. *Id.*, slip op. at 17. In so holding, the New Jersey Supreme Court reasoned that the "language [of the tolling provision] must be interpreted from the intent of the Legislature at the time of enactment." *Id.*, slip op. at 15. At the time the tolling provision was enacted, the concept of "representation" within New Jersey, as that term is used in the tolling provision, could not have included amenability to long-arm jurisdiction, because long-arm jurisdiction did not then exist. *See* notes 6 and 7 *supra*. Thus, the court reasoned that incorporating the judicial expansion of long-arm jurisdiction into its interpretation of the tolling provision would be accepting the argument that "a Rule of Court can act as an implied, partial repeal of a legislative enactment." This the Supreme Court of New Jersey refused to do. *Velmohos, supra*, slip op. at 16.

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8. Any construction of the New Jersey tolling provision by the state's highest court would, of course, be binding upon us. Similarly, we would be bound if the New Jersey Supreme Court *struck down* the provision on *state* constitutional grounds. However, any decision of the New Jersey Supreme Court on *federal* constitutional grounds is not binding upon us.

Having thus disposed of the defendants' statutory arguments,[9] the *Velmohos* court then proceeded to consider and, after consideration, to reject the constitutional challenges to the tolling provision. The court concluded that the existence of long-arm jurisdiction did not destroy the rationality of the tolling provision, observing that extra-territorial service is far more difficult to achieve than service within the state. *Id.*, slip op. at 23.[10]

Since *Velmohos* has been decided and we have received comments from the parties, we now turn to the issues presented to this court. We conclude that the defendants in both cases are subject to the New Jersey tolling provision and that the tolling provision does not violate the fourteenth amendment of the United States constitution.

II.

A.

The first step in our analysis of the merits of these appeals has been facilitated, to a great extent, by the opinion of the New Jersey Supreme Court in *Velmohos*. For after *Velmohos*, a corporation whose only "presence" in New Jersey is that it is amenable to the state's long-arm jurisdiction, clearly cannot argue that under the tolling statute, it is "represented" in New Jersey so as to obtain the benefit of New Jersey's limitations stat-

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9. Two justices dissented from the majority opinion in *Velmohos*. They would have construed the tolling provision as inapplicable to corporations which are amenable to long-arm jurisdiction. Consequently, they did not reach the constitutional questions. *See* Velmohos v. Maren Engineering Corp., *supra* (Sullivan, J. dissenting, joined by Handler, J.)

10. The New Jersey Supreme Court observed that, had the statute been attacked under the New Jersey state constitution, its analysis and result would have been no different. *Velmohos*, *supra*, slip op. at 18-19 n.12.

ute.[11] In *Kelsey-Hayes*, this holding settles the statutory issue, enabling us to proceed directly to the constitutional question, because Kelsey-Hayes, the corporate defendant in that case, had no other "presence" in New Jersey apart from its amenability to long-arm jurisdiction.

In *Searle*, however, the statutory issue has not been completely resolved by *Velmohos* in light of the presence of Searle's detail-persons in New Jersey. The district court in *Searle* ruled that the existence of these detail-persons did not preclude the operation of the tolling statute, and Searle's appeal from that ruling is the subject of No. 79-2605. Although it has not expressly decided the issue before us, we are convinced from the *Velmohos* opinion, that the New Jersey Supreme Court would similarly conclude that Searle's detail-persons are not the "representatives" contemplated within the tolling provision.

As previously indicated, in *Velmohos*, the New Jersey Supreme Court emphasized that the language of the tolling provision "must be interpreted from the intent of the Legislature in light of the circumstances at the time of enactment." *Velmohos, supra*, slip op. at 15. At the time the tolling provision was amended to refer to corporations which were "represented" in New Jersey, *see* note 5 *supra*, personal service upon minor functionaries such as Searle's detail-persons would not have sufficed to obtain jurisdiction over foreign corporations. *In*

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11. Many other state courts have construed their tolling provisions differently, so that out-of-state defendants amenable to long-arm jurisdiction would be exempt from the tolling rule. *See generally* Annot., *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence*, 55 A.L.R.3d 1158. As the *Velmohos* majority points out, however, those cases involved different statutory language than the New Jersey tolling provision. *See Velmohos, supra* slip op. at 14 & 14 n.8.

personam jurisdiction over foreign corporations could only have been obtained by service upon officers or duly appointed agents of the company. *See* N.J.S.A. §2:26-44 (repealed) (quoted in note 6 *supra*); *Porcelli v. Great Atlantic & Pacific Tea Co.*, 128 N.J.L. 603, 27 A.2d 641 (Sup. Ct. 1941); *cf.* N.J. Ct. R. 4:4-4(c)(1); *Wright v. News Syndicate Co.*, 35 N.J.Super. 133, 113 A.2d 215 (1955) (service on "any servant of the corporation" within New Jersey appropriate under current rules). Thus, the New Jersey legislature could not have intended that individuals such as Searle's detail-persons could obtain the benefits of the limitations statutes for their companies, particularly since the detail-persons had only a minimal affiliation with Searle and could not, at the time tolling provision was enacted, have subjected Searle to *in personam* jurisdiction in New Jersey.

Moreover, it is significant, as the New Jersey Supreme Court noted, *see Velmohos, supra*, slip op. at 15, that the tolling provision speaks of individuals who "represent," rather than just "act" for, the foreign corporation in New Jersey. By contrast, the applicable court rules of service speak only of "servants" who merely "act" in New Jersey. *See* N.J. Ct.R. 4:4-4(c)(1). It appears to us, therefore, that the statutory tolling provision contemplates a much more significant corporate figure or presence — one capable of "representing" the corporation — than does the service rule. This higher standard which requires "representation" in New Jersey before a foreign corporation can receive the benefits of the limitations statutes, comports with the original purpose of the tolling rule: to permit plaintiffs who have causes of action against foreign corporate defendants which are not represented in New Jersey, to maintain the viability of their actions despite the passage of time. Moreover, this purpose is consistent and compatable with New Jersey's policy of liberally construing limitations statutes so as to preserve, whenever possible, a plaintiff's opportunity to litigate his claim on the merits. *See Velmohos,*

supra; Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 412 A.2d 122 (1980).

Therefore, in light of its own statutory analysis, we are satisfied that the New Jersey Supreme Court, if faced with this question, would hold that Searle's detail-persons do not constitute "representation" of Searle in New Jersey, sufficient to provide New Jersey's limitations protections to Searle. To the contrary, we are convinced that the New Jersey Supreme Court would hold, and consequently we hold, that Searle's detail-persons do not exempt it from the tolling provision. Accordingly, unless the tolling provision is unconstitutional, and we conclude that it is not, the limitations statute will not bar the plaintiffs' claims against the defendants in both cases before us.

B.

Thus, there remains for consideration only the constitutional challenges made here to the tolling provision. The defendants concede that the tolling provision does not implicate any fundamental interest or suspect classification.[12] In these circumstances, we ordinarily afford

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12. Indeed, this concession would seem to be compelled by Campbell v. Holt, 115 U.S. 620 (1885) where the Supreme Court held that repeal of a statute of limitations as to debts which had already been barred did not implicate the fourteenth amendment rights of the debtor. In reaffirming *Campbell*, some 60 years later, the Court, speaking through Justice Jackson, stated:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable de-

great leeway to legislative judgments. As we recently stated:

> In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers *any* legitimate state objective. "For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision. . . ." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. *See Weinberger v. Salfi*, 422 U.S. 749, 780 (1975); *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 487-90 (1955); *Trafelet v. Thompson*, 594 F.2d 623, 626 (7th Cir.), *cert. denied*, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 1, 1979).

Malmed v. Thornburgh, No. 79-2467, slip op. at 7, (3d Cir. May 13, 1980) (Aldisert, J.) (emphasis in original). Thus, the defendants challenging the constitutionality of the tolling provision have the difficult burden of demonstrating that the provision cannot "rationally further[ ] *any* legitimate state objective." *Id.*

NOTE 12 — *(Continued)*

> lay. They have come into the law not through the judicial process but through legislation.[13] They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large decree of legislative control.

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (footnote omitted). Thus, it is clear that the defendants have no "right" to protection of the statute of limitations. Their only claim can be that the state legislature acted irrationally, under the circumstances, by denying them the benefit of the limitations statute.

In seeking to meet this burden, the defendants argue that the tolling provision violates the constitution because it is overprotective.[13] They argue that the purpose of the tolling provision was to protect New Jersey plaintiffs who could not obtain *in personam* jurisdiction over out-of-state defendants.[14] The defendants contend that the tolling provision is no longer relevant or needed to promote this interest in cases where an out-of-state corporate defendant is amenable to New Jersey's long-arm jurisdiction. In such cases, they contend the plaintiffs may assert their causes of action and serve their complaints upon non-represented foreign corpo-

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13. When no fundamental interests or suspect classifications are involved, both "underinclusive" and "overinclusive" statutes are subjected to the same "minimum rationality" test. Nevertheless, it has been argued that "overinclusive" or overprotective statutes present even less need for judicial action than statutes which are "underinclusive" in their regulatory sweep:

> "Overinclusiveness," a second variant of legislative approximation for which a classification may be overturned,[16] poses less danger than underinclusiveness, at least from the viewpoint of political accountability, for overinclusiveness does not exempt potentially powerful opponents from a law's reach.

L. Tribe, American Constitutional Law, 999 (1978). (Footnote omitted).

14. In a technical sense, this appears to be an oversimplification. In 1949, the tolling provision was amended to exempt foreign corporations "represented in this state by any person or officer upon whom summons . . . may be served . . . ." Four years earlier, however, the Supreme Court had greatly expanded the states' jurisdictional powers over out-of-state defendants, permitting the state courts to exercise *in personam* jurisdiction over out-of-state defendants with "certain minimum contacts" with the forum state. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Thus, at the time the tolling provision was last amended, New Jersey plaintiffs could have constitutionally obtained service on foreign corporations who did not have "representatives" in the state. The New Jersey courts did not recognize the full expanse of long-arm jurisdiction until much later, however. *See* Avdel Corp. v. Mecure, 58 N.J. 264, 277 A.2d 207 (1971); notes 6 and 7 *supra*.

rate defendants in the same fashion as they serve domestic corporations or foreign corporations "represented" in New Jersey. Thus, they claim that the extra protection provided New Jersey plaintiffs by the tolling provision, is unnecessary and arbitrary in light of the original purpose of the tolling provision. Being arbitrary, they contend the statute is therefore unconstitutional.

The defendant's argument overlooks the fact that the tolling provision must be upheld if it "rationally furthers *any* legitimate state objective," without regard to whether the legislature specifically focused on that objective. *Malmed v. Thornburgh, supra.* In this case, at least one such legitimate objective is readily apparent: the tolling provision eases the burdens upon New Jersey plaintiffs prosecuting lawsuits against out-of-state defendant corporations which are not represented in New Jersey and which, in a great many instances, are difficult to locate and to serve, despite the availability of the long-arm rule. The New Jersey Court Rules, by their very terms, make clear that long-arm service may be utilized only as a last resort. They provide that service may be made

> [u]pon a domestic or foreign corporation, by serving . . . either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. *If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service*

> *cannot be made upon any of the foregoing* and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

N.J. Ct.R. 4:4-4(c)(1) (emphasis added).

Moreover, Justice Pashman in writing for the New Jersey Supreme Court in *Velmohos* emphasized the special burdens which inhere in achieving long-arm service:

> Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is "consistent with due process of law."

Velmohos, supra, slip op. at 23.

Since long-arm service is more difficult to achieve than service within the state, it is not irrational for New Jersey to distinguish between two classes of foreign corporations. Those foreign corporations which are represented in New Jersey, and are thus more readily available to plaintiffs, are afforded limitations protections. On the other hand, the limitations statutes are tolled against foreign corporations which are not represented in New Jersey and thus are not as available to New Jersey plaintiffs. This distinction between represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate de-

fendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it recognizes is irrational.[15]

In arguing against the constitutionality of the tolling provision, the defendants attempt to distinguish between the service of a complaint and the filing of a complaint. They point out that, under New Jersey practice, a plaintiff can file a "John Doe" complaint, and thereby stop the running of the statute of limitations without having served the defendant with process. *See* N.J. Ct.R. 4:4-1 (summons must be served within 10 days of filing a complaint or action may be dismissed on defendant's motion). This procedure, they argue, enables a plaintiff to preserve his complaint against a statute of limitations defense, notwithstanding any later difficulties encountered in serving process. Because of this procedure, the defendants contend that the protection afforded by the tolling provision is superfluous and that the tolling provision is thus arbitrary, irrational and, consequently, unconstitutional.

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15. Although many courts have construed state tolling statutes so as to exempt individuals who are subject to service of process in the state, *see* note 10 *supra*, no court, other than the district court in Cohn v. Searle, *supra*, has concluded that such a result was mandated by the constitution. In fact, in Vaughn v. Deitz, 430 S.W.2d 487 (Sup. Ct. Tex. 1968), the Texas Supreme Court specifically upheld the Texas tolling statute against a constitutional argument identical to that raised here.

Moreover, in Bauserman v. Blunt, 147 U.S. 647 (1893), the Supreme Court gave effect to a Kansas statute which tolled the statute of limitations in an action against an out-of-state defendant who was nevertheless subject to service in the state. Although *Bauserman* did not discuss the constitutional issue, the court implicitly recognized the constitutionality of this type of tolling provision.

We are not persuaded by the defendants' argument. In the first instance, the protection afforded plaintiffs by the "John Doe" procedure is imperfect, at best. Complaints filed in this manner are subject to dismissal after six months on the court's own motion, unless the plaintiff, by proving his diligence, can convince the court to retain the case on the docket. N.J.Ct.R. 1:13-7. We do not believe that, given their crowded calendars, the state courts would permit a "John Doe" complaint to remain on the docket for a lengthy or indefinite period of time. Thus, the "John Doe" procedure does not, in fact, afford New Jersey plaintiffs the same protection as the tolling provision. Furthermore, the defendants' argument suffers from a more basic flaw. Even if the tolling provision could be considered superfluous in light of the "John Doe" procedure, this would not necessarily lead to our holding that the tolling provision is arbitrary or irrational. Nothing in law or logic prevents the New Jersey legislature from providing New Jersey plaintiffs with a mechanism for relief from the burdens of suits against non-represented foreign corporations which is additional to any mechanism found in the Court Rules.

Accordingly, since we find that N.J.S.A. §2A:14-22 has a rational foundation, and recognizing that rationality is the test for both due process and equal protection challenges in this context, *see Malmed v. Thornburgh, supra*, we reject the defendants' constitutional attacks on the statute.

III.

We therefore hold that the foreign corporate defendants in these cases, not being represented in New Jersey, are subject under New Jersey law to New Jersey's tolling provision, which we hold to be constitutional. Thus, in these cases, defendants may not claim the protection of the statute of limitations. In light of our conclusion, the interlocutory order of the district court

which denied summary judgment in *Hopkins v. Kelsey-Hayes*, at No. 79-1881, will be affirmed, and the order of the district court in *Cohn v. G.D. Searle*, at Nos. 79-2406 and 79-2605, entering judgment for the defendant will be reversed. Each case will be remanded to the particular district court for further proceedings. Costs in each case will be taxed against the respective defendant.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1881

ROY HOPKINS

v.

KELSEY-HAYES, INC.,

Appellant

(D. C. Civil No. 78-1646)

Nos. 79-2406 and 79-2605

SUSAN COHN and WALTER R. COHN, her husband,
Appellants in No. 79-2406

v.

G. D. SEARLE & COMPANY,
Appellant in No. 79-2605

(D. C. Civil No. 74-0450)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Present: ADAMS, VAN DUSEN and GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on February 11, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 27, 1979 and appealed at our No. 79-1881, be, and the same is hereby affirmed, and the judgment of the said District Court filed August 6, 1979 and appealed at our Nos. 79-2406 and 79-2605, be, and the same is hereby reversed, and the causes are remanded to the particular District Court for further proceedings consistent with the opinion of this Court. Costs in each case are taxed against the respective defendant.

Attest:

THOMAS F. QUINN
Clerk

July 23, 1980

APPENDIX B

United States District Court,
D. New Jersey.

ROY HOPKINS, Plaintiff,

v.

KELSEY-HAYES, INC., Defendant.

Civ. A. No. 78-1646.

Dec. 18, 1978.

OPINION

BROTMAN, *District Judge.*

Defendant in this diversity case moves for summary judgment, Fed. R. Civ. P. 56, on the ground that plaintiff's action is barred by the applicable statute of limitations. Because we find that the running of the statute has been tolled by N. J. S. A. 2A:14-22, we deny the motion.

Plaintiff is a New Jersey resident. Defendant is a foreign corporation, organized under the Delaware corporation laws. Defendant admits at ¶ 1 of its answer to the complaint and in its supplemental brief that it has not filed a certificate to do business or a certificate of authority in New Jersey, and indicates that it is not otherwise represented in the State for purposes of service of process.

The suit is one to recover damages for personal injuries allegedly sustained by plaintiff when a tire mounted on a rim manufactured by defendant exploded. This occurred on May 18, 1975 in New Jersey; the suit naming this defendant was filed on April 27, 1978, almost three years after the accident. Normally, the two-year statute

of limitations applicable to suits for personal injury would bar the suit, N. J. S. A. 2A:14-2. However, N. J. S. A. 2A:14-22 very explicitly provides for the tolling of such statute of limitations where and so long as "any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served." The statute also applies to non-resident, individuals or resident individuals outside the state.[1]

Defendant argues that the New Jersey long-arm rule, R. R. 4:4-4 which became effective against corporations in September, 1958, allows the plaintiff to serve defendant

1. The full statutory provision reads:

2A:14-22. Nonresidence of person liable

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

by registered mail in Delaware. The defendant therefore contends that the tolling statute should be construed as inapplicable to it. The weight of authority is squarely against defendant on this point. The courts have reasoned that the intent of the legislature which enacted the tolling provision many years prior to the adoption of the long-arm rules must be ascertained relative to the circumstances prevailing at the time of the enactment. *Cohn v. G. D. Searle & Co.*, 447 F. Supp. 903, 907 (D. N. J. 1978) (corporate defendant); *Fidelity & Deposit Co. of Md. v. Abagnale*, 97 N. J. Super. 132, 143, 234 A. 2d 511 (Law Div. 1967).[2] The courts in both cases construed the tolling statute as applicable in situations where the defendant was subject to service by mail under the long-arm rules.

This tolling statute has been strictly construed by the New Jersey courts in cases involving automobile accidents in New Jersey where the defendants are non-resident motorists. Cases are virtually uanimous in holding that substituted service imposed by statute, through the New Jersey Director of Motor Vehicles, N. J. S. A. 39:7-2, does not entitle the non-resident defendant to the benefit of the statute of limitation. This is true whether the defendant is an individual or a corporation. *Lackovic v. New England Paper Tube Co., Inc.*, 127 N. J. Super. 394, 317 A. 2d 426 (Law Div. 1974) (corporate defendant); *Lemke v. Bailey*, 41 N. J. 295, 301, 196 A. 2d 523 (1963); *Whalen v. Young*, 28 N. J. Super. 543, 101 A. 2d 64 (Law Div. 1953), *rev'd on other grounds*, 15 N. J. 321, 104 A. 2d 678 (1954) (corporate defendant); *Blackmon v. Govern*,

2. Like the district court in *Cohn* which cited the state court holding in *Fidelity*, we perceive no important distinction for our purposes between individual and corporate defendants and will analyze the problem without regard to the type of defendant. *See also, Lackovic v. New England Paper and Tube Co., Inc.*, 127 N. J. Super. 394, 397, 317 A. 2d 523 (Law Div. 1974).

138 F. Supp. 884 (D. N. J. 1956); *Gotheiner v. Lenihan*, 20 N. J. Misc. 119, 25 A. 2d 430 (Sup. Ct. 1942). The only holding the other way, *Ferraro v. Ferro Trucking Co.*, 72 N. J. Super. 519, 179 A. 2d 74 (Law Div. 1962), has been discredited. *See Lackovic v. New England Paper Tube Co., Inc., supra; Lemke v. Bailey, supra.* Thus, even where a non-resident corporation can easily be served by substituted service within New Jersey, the tolling statute applies to deny it the protection of the statute of limitations.

We preceive no relevant distinction for our purposes between the substituted service in non-resident motorist cases and long-arm service by registered mail. Moreover, the New Jersey courts have expressly noted that the rationale of the non-resident motorist cases is equally applicable to the long-arm service situation. In *Guas v. Guas*, 146 N. J. Super. 541, 370 A. 2d 91 (Law Div. 1977), the state court held that a resident individual physically outside New Jersey but continuously amenable to service under the long-arm rule relative to New Jersey-licensed drivers of New Jersey-registered vehicles was still subject to the tolling statute. The court cited *Lemke v. Bailey, supra,* a non-resident motorist case, as conclusive support for this result. *Guas v. Guas, supra,* 146 N. J. Super., at 547, 370 A. 2d 91. Similarly, in *Fidelity & Deposit Co. of Md. v. Abagnale, supra,* 97 N. J. Super. at 144, 234 A. 2d 511 the state court held that *Lemke v. Bailey* governed the situation where a resident who became absent from the state after the accrual of the cause of action was subject to extraterritorial service by mail.

We decline to depart from this line of authority; thus, we refuse to interpret the New Jersey tolling provision to allow this defendant to invoke the statute of limitation defense simply because it is amenable to long-arm service. Our examination of the New Jersey state court authority

convinces us that this is the interpretation they would render.

The language of the tolling statute unequivocably requires a representative within the state for service of process, and does not require that a plaintiff resort to service beyond the borders of New Jersey to receive the benefits of the tolling provisions. Furthermore, the tolling statute has been on the law books since 1820, with the amendment relative to corporations enacted in 1949. The long-arm rules applicable to corporations have been in effect since 1958. Surely the New Jersey legislature is aware of the argument advanced by defendants, and it is incumbent upon it to make any change it deems appropriate. *See Lemke v. Bailey, supra,* 41 N. J. at 302, 196 A. 2d 523. Finally, we note that were we to agree with defendant, the tolling provision would be meaningless with respect to non-resident corporations, since the vast majority who commit torts within the state would be amenable to long-arm service. Without more authority, we cannot construe a state statute in a manner rendering it ineffective.

Defendant also argues that this construction of the tolling statute creates an arbitrary and discriminatory classification, in violation of the New Jersey and federal constitutional equal protection guarantees. We reject the argument. In doing so, we note that in the recent case of *Cohn v. G. D. Searle & Co., supra,* decided in this district, the court reached an opposite conclusion. We respectfully disagree with the holding of *Cohn.* Although Judge Meanor stated that his analysis was grounded in the equal protection clause and not the due process clause, we perceive his discussion to state a substantive due process holding. The *Cohn* court concluded that in light of amenability to service through the long-arm rules, the distinction between domestic and foreign corporations em-

bodied in the tolling statute "bears no rational relationship to the object of the tolling statute." *Id.* at 912. We view this as a substitution of the court's judgment on the policies behind the tolling statute for that of the legislature. Indeed, in *Fidelity & Deposit Co. of Md. v. Abagnale, supra,* 97 N. J. Super. at 144, 234 A. 2d at 518, the New Jersey court saw a reasonable basis for distinguishing between defendants servable in New Jersey and those servable only outside New Jersey:

> ". . . the view might have prevailed that the facility of extra-territorial service did not meet the hardship of locating a departed resident in the sprawling country beyond New Jersey's borders."

In addition, the New Jersey Supreme Court has held that there is no constitutional infirmity under either the state or the federal constitution, in a case where the defendant non-resident motorist was amenable to substituted service within New Jersey. *Lemke v. Bailey, supra,* 41 N. J. at 303, 196 A. 2d 523. In our case where there are greater hardships associated with service outside the state under a long-arm rule, *a fortiori,* the distinction drawn by the tolling statute is rational and passes constitutional muster.

Having denied the motion based on N. J. S. A. 2A:14-22, there is no need to reach the "discovery rule" issue. The motion for summary judgment is hereby denied.

Supreme Court, U.S.
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No. 80-663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KELSEY-HAYES, INC.,

Petitioner,

vs.

ROY HOPKINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioner's first question presented for review is properly stated.

2. Petitioner's phrasing of its second question for review incorrectly implies that there is a "penalty" assessed against defendant under New Jersey Law, and that New Jersey law will also allow plaintiffs to pursue claims which will always be "stale." The question presented for review would be more fairly stated as follows:

> Whether the resultant pressure upon corporations throughout this country, engaged solely in interstate commerce, to register to do business in New Jersey constitutes an impermissible infringement upon interstate commerce in violation of the Commerce Clause of the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

Petitioner has correctly identified the parties to the proceedings in the Court of Appeals. However, a directly related case involving the same questions for review is now on appeal to the Supreme Court of the United States from a decision of the Supreme Court of New Jersey. That case is identified in this court as *Maren Engineering Corp. v. Konstantin Velmohos,* No. 80-629.

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CITATIONS TO OPINIONS BELOW

Petitioner's citations to the opinions in the District Court and the Court of Appeals are correct.

The Opinion of the Supreme Court of New Jersey in a related case—presently on appeal before this Court under the caption of *Maren Engineering Corp. v. Konstantin Velmohos*, No. 80-629—is reported *sub nom. Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980).

REASONS WHY THE WRIT SHOULD BE DENIED

Point I

No reason exists to grant *certiorari* to review the constitutionality of the classification created by the New Jersey Tolling Statute, sustained by both the Third Circuit and New Jersey Supreme Court since neither a fundamental interest nor conflicting decisions are involved and review would only affect parties to suits in a small minority of states.

The first question presented by the petition is whether the classification drawn by the New Jersey tolling statute between foreign corporations having a registered agent for service of process in the state and unregistered foreign corporations, the latter being precluded from asserting the defense of the statute of limitations in suits brought in New Jersey courts, "lacks a rational basis" and therefore violates the petitioner's right to due process and equal protection. This question is not sufficiently important to warrant an exercise of the Court's discretionary review for several reasons.

First, as the petitioner conceded below, the availability of the defense of the statute of limitations is not a fundamental right or privilege. This Court has so held in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), which *reaffirmed* the holding of *Campbell v. Holt*, 115 U.S. 620 (1885), that a repeal of the statute of limitations reviving a creditor's right of action on a debt does not deprive the debtor of property without due process. The Court, in an opinion by Justice Jackson, stated as follows:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They rep-

> resent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable *[sic]* and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. *Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual.* He may, of course, have the protection of the policy while it exists but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control. 325 U.S. at 314 (citations & footnote omitted; emphasis supplied).

Because no fundamental right is implicated, review of the statutory classification would not require strict scrutiny, *see Scherling v. Superior Court of Santa Clara County*, 22 Cal.3d 493, 149 Cal. Rptr. 597 (602-03 (1978)) (applying rational relationship standard or review in upholding statute tolling statute of limitations during criminal defendant's absence from state), but merely a determination of whether "any state of facts reasonably may be conceived to justify it." *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584 (1935).

Nor does New Jersey's denial of the defense of the statute of limitations to nonregistered foreign corporations even begin to "approach sensitive and fundamental personal rights" so as to trigger the application of the inter-

mediate or "middle-tier" level of scrutiny which has been utilized by the Court in cases involving discrimination based on gender or illegitimacy. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972) (illegitimacy); *see Craig v. Boren*, 429 U.S. 190, 210 (1976) (gender) (Powell, J., concurring). Thus, the applicable standard of review is not whether the statutory classification bears a "fair and substantial relation" to the stated object of the legislation, *Reed v. Reed*, 404 U.S. 71, 76 (1971) (gender discrimination), citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 416 (1920), but rather whether the classification bears some rational relationship to legitimate state purpose. *Weber, supra*, 406 U.S. at 172; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

Moreover, the Third Circuit correctly decided that the classification drawn by the New Jersey tolling statute between registered and nonregistered foreign corporations rationally furthers at least two legitimate state purposes. First, because an out-of-state corporation which has a local registered agent is much easier to identify and locate than an unregistered foreign corporation, the New Jersey legislature could have reasonably concluded that tolling the statute of limitations in favor of plaintiffs suing unregistered corporations in New Jersey courts was necessary in order to give such plaintiffs additional time to identify and locate their defendants. Also, the New Jersey Court Rules make a real and substantial distinction between service of process on a locally registered corporation and long-arm service by mail upon an unregistered out-of-state corporation. While service can be made under *New Jersey Court Rule* 4:4-4 (c)(1) upon a registered corporation "by serving . . . the person at the registered office of the corporation in charge thereof," long-arm service upon an unregistered foreign corporation requires that: (1) an attempt be made to serve the corporation within the state;

(2) an affidavit be filed by the plaintiff's attorney "that after diligent inquiry and effort personal service cannot be made" within the state; and (3) a showing be made that service by mail upon the corporation will be "consistent with due process of law." Because of these additional burdens upon a plaintiff seeking to obtain long-arm service upon an unregistered foreign corporation, the state legislature could have rationally concluded that tolling the statute of limitations in favor of such a plaintiff would give him the additional time needed to effect long-arm service and thereby eliminate the injustices due to time pressures that might otherwise result.

Although petitioner has repeatedly asserted that the New Jersey statute called into question here will allow a plaintiff an unlimited amount of time to delay institution of suit with accompanying prejudice to the defendant, the New Jersey Supreme Court has stated directly to the contrary, as follows:

> Contrary to defendants' and our Brother Sullivan's contentions, see *post* at (Slip op. at 1-2), the length of a defendant's exposure to suit without such an agent will not be determined solely by a plaintiff's convenience. If a plaintiff's delay is *inexcusable* and has resulted in *prejudice* to the defendant, the latter may raise the equitable defense of *laches* to bar the claim. (Citations omitted). *Velmohos v. Maren Engineering Corporation*, 83 N.J. 282, 416; A.2d 372 (1980) n.10.

A second reason for denying *certiorari* in this case is the fact that the Third Circuit's decision does not conflict with the decision of any other court of appeals or any state supreme court. The Third Circuit, in upholding the distinction made by the New Jersey tolling statute as

against equal protection and due process attack, expressly followed the New Jersey Supreme Court's decision on the exact same question in *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372, 379-81 (1980), *aff'd* 168 N.J. Super. 520, 403 A.2d 927, 930-32 (App. Div. 1979). Both the Third Circuit and New Jersey decisions are also in accord with the holdings and *dicta* in other courts of appeal and state high court decisions on similar issues. *See Zalatuka v. Metropolitan Life Insurance Co.*, 90 F.2d 230 (7th Cir. 1937) *(dicta)* (state legislature may distinguish between domestic and foreign insurance companies for purposes of determining time within which suits on insurance policies may be instituted or be forever barred); *Dew v. Appleberry*, 23 Cal. 3d 637, 153 Cal. Rptr. 219, 223 (1979) (statute tolling statutes of limitations which defendant absent from state did not penalize exercise of fundamental right and was rationally related to alleviating "any hardship that would result by compelling plaintiff to pursue defendant out of state"); *Vaughn v. Deitz*, 430 S.W.2d 487, 490 (Tex. 1968) (upholding statutes of limitations while defendant absent from state since distance of defendant from state may make it more expensive and difficult for plaintiff to locate defendant for purpose of effecting service or process by mail). Finally, this Court has upheld, against an equal protection attack, an Indiana statute which prohibited foreign casualty insurance companies from limiting by agreement to less than three years the time within which a suit could be brought against them on their indemnity policies while permitting domestic casualty insurance companies to contract for any reasonable limitation period. *Metropolitan Casualty Insurance Co. v. Brownell, supra*, 294 U.S. at 580-81.

Neither does the alleged fact that the unregistered foreign corporation in the particular case presented here was at all times readily amenable to service of process justify review. In *Clark v. Gulesian*, 429 F.2d 405 (1st

Cir. 1970), *cert. denied*, 400 U.S. 993 (1971), application of Maine decisions rejecting the adoption of the "discovery" rule barred the plaintiff from maintaining a medical malpractice action even though the plaintiff did not learn of the defendant doctor's negligence until a second operation in 1969 revealed that a towel had been left inside the plaintiff's body during initial surgical treatment in 1952. In holding that the Maine statute of limitations as interpreted and applied by the Maine decisions was not unconstitutional as a denial of due process or equal protection, the First Circuit emphasized that Maine's rejection of the discovery rules was a "policy decision" and reasoned as follows:

> Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of state claims, however free of fault the claimant's delay may be. 429 F.2d at 406. *Accord, Pittman v. United States*, 341 F.2d 739, 741 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965).

Similarly, New Jersey's decision to toll the statutes of limitations in suits against nonresident unregistered corporations was a policy decision and the fact that petitioner may not have contributed to any delay in the filing of the action in the case at bar does not preclude the state from reasonably concluding that plaintiffs in suits against unregistered foreign corporations should generally have the benefit of additional time in which to locate and effect service of process upon their defendants.

A final reason for refusing to grant *certiorari* is the fact that any decision by the Supreme Court in this case would not have nationwide impact but would only affect parties to suits in a handful of states. In order for the

Third Circuit to reach the constitutional issues presented here, the New Jersey Supreme Court in *Velmohos* had to construe *N.J.S.A.* §2A:14-22 as tolling the statutes of limitations in suits against an unregistered foreign corporation despite the corporation's amenability to long-arm service of process. 416 A.2d at 377-78. On this state question of statutory construction, New Jersey is clearly in a small minority.[1] *See, e.g., Cohn v. G.D. Searle & Co.*, 447 F. Supp. 903, 912-13 & n. 21 (D.N.J. 1978), *rev'd on other grounds*, 628 F.2d 801 (3d Cir. 1980) (counting 38 states as taking majority position and only four, including New Jersey, taking the minority position); *Daigle v. Leavitt*, 54 Misc. 2d 651, 283 N.Y.S.2d 328, 330-31 (Sup. Ct. 1967) (19 and 6); Note, 12 *Wake For. L. Rev.*, 1041, 1045 (1976) (29 and 6). Since the New Jersey legislature may well decide to join the majority by amending its tolling statute expressly to preclude tolling where an out-of-state defendant is amenable to service of process under the New Jersey long-arm rule, see, *e.g., Ill. Rev. Stat.* ch. 83, §19 (as amended 1973), it is not necessary for this Court to grant *certiorari* to review a decision of only local importance. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process . . . ." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

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1. In explaining its divergence from the majority rule, the New Jersey Supreme Court pointed to the fact that *N.J.S.A.* § 2A:14-22 is phrased in terms of representation within the state while the tolling statutes in majority-rule states are phrased in terms of "absence" from the state, "general language which more readily lends itself to flexible interpretation." *Velmohos, supra*, 416 A.2d at 377-78.

Point II

Since the New Jersey Tolling Statute as presently construed does not discriminate against interstate commerce and only incidentally burdens such commerce while serving valid local purposes, the Commerce Clause Question does not warrant the exercise of this Court's Discretionary Review.

The New Jersey tolling statute does not on its face or in practical operation necessarily discriminate against inter-state commerce, at least as presently construed by the New Jersey Courts. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). With respect to foreign corporate defendants in suits brought in New Jersey courts, statutes of limitations are tolled by *N.J.S.A.* §2A:14-22 under the following circumstances:

> [I]f [the foreign corporation] . . . is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues *or at any time before the expiration of the times so limited, the time or times during which such corporation . . . is not represented within this* state shall not be computed as part of the periods of time within which such an action is required to be commenced . . . (Emphasis supplied).

As the underlined language indicates, the tolling statute does not apply just in suits brought against foreign corporations which have been engaged solely in interstate commerce and have never been required to maintain an in-state agent for service of process. The tolling statute halts the running of statutes of limitation in suits against any foreign corporation that is engaged in intrastate and interstate commerce in New Jersey at the time a particular

cause of action accrues but which temporarily or permanently discontinues its intrastate business (and the accompanying maintenance of a local registered agent) before the applicable statute of limitation has run. While no New Jersey court has addressed the precise issue, several New Jersey courts have similarly held that tolling occurs under *N.J.S.A.* §2A:14-22 when an individual defendant who is a resident of New Jersey at the time the plaintiff's cause of action accrues, subsequently leaves the state before the applicable statute of limitations has run. *Guas v. Guas*, 146 N.J. Super. 541, 370 A.2d 91, 94-95 (Law Div. 1977); *Fidelity & Deposit Company of Maryland v. Abagnale*, 97 N.J. Super. 132, 234 A.2d 511, 518 (Law Div. 1967). Since tolling may therefore occur in an action against a foreign corporation arising out of either intrastate or interstate commerce, the statute does not discriminate on its fact against interstate commerce.

Moreover, while there is a split of authority on the issue, a New Jersey appellate court has held that a nonresident plaintiff such as the petitioner is entitled to the benefit of the tolling statute. *Govan v. Trade Bank & Trust Co.*, 109 N.J. Super. 271, 263 A.2d 146, 149 (App. Div. 1970). *Contra, Zelson v. Thomforde*, 428 F.2d 1360, 1362 (3d Cir. 1970);[2] *Leon v. Febbraro*, 165 N.J. Super. 205, 397 A.2d 1129, 1130 (Law Div. 1977). Thus, under current New Jersey law, there is no discriminatory impact on interstate commerce since under the *Goven* decision an unregistered foreign corporation as a plaintiff could obtain the same benefits from the tolling statute as a New Jersey resident or corporation.

Nor does the tolling statute in its practical operation discriminate against interstate commerce. This is not a

2. Although *Zelson* was decided a few months after the *Goven* decision, the Third Circuit in *Zelson* did not mention or discuss the New Jersey case in reaching its decision.

case where New Jersey has "overtly block[ed] the flow of interstate commerce at [the] State's borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). This is not a case where New Jersey has given its residents a preferred right of access over nonresidents to resources located within its borders. *Hughes v. Oklahoma, supra; Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). The petitioner has free and unrestricted access to New Jersey's markets and resources. Moreover, *N.J.S.A.* §2A:14-22 does not amount to a statute requiring a foreign corporation engaged in interstate commerce to register as a condition precedent to suit in New Jersey's courts. *Compare Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20 (1974). The statute does not penalize a foreign corporation for not maintaining a local registered agent in the state; it merely presents such a corporation with a tolled statute of limitations. *Cf. Dew v. Appleberry*, 23 Cal. 3d 637, 153 Cal. Rptr. 219, 223 (1979).

Finally, the burden placed on interstate commerce by the tolling statute is very slight when compared with the local benefits to be derived from its operation.

> Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Unregistered foreign corporations appearing as defendants, may be required to defend a few additional New Jersey lawsuits that would otherwise be banned by the applicable statute of limitations. Those corporations appearing as plaintiffs may be able to prosecute a few addi-

tional suits that would otherwise be banned. In any event, New Jersey obtains the benefit of protecting the plaintiffs who use its courts from the injustices that might otherwise result from the often burdensome and time-consuming tasks of identifying, locating and obtaining service of process upon unregistered out-of-state corporations. In light of the fact that the burden involved here is slight and under present New Jersey law there is no discrimination against interstate commerce, there is no reason to grant *certiorari* to review the statute in question under the commerce clause.

CONCLUSION

For the reasons set forth herein, respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari requested by petitioner.

Respectfully submitted,

/s/ J. Llewellyn Mathews
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